IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5615

DOMINIC CODISPOTI and
HERBERT LANGNES,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR PETITIONERS

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OPINION BELOW

The Opinion of the Supreme Court of the Commonwealth of Pennsylvania is reported at 453 Pa. 619.

JURISDICTION

The Judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on July 2, 1973. The Petition for a Writ of Certiorari was filed on October 2, 1973 and was granted on December 3, 1973. Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States:

Article III, §2, "The trial of all crimes, except in cases of impeachment shall be by jury . . ."

Amendment VI – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and just trial by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation * * *."

Statutes of the United States

Title 18, U.S.C. §1, "Notwithstanding any Act of Congress to the contrary:

1. Any offense punishable by death or imprisonment to a term exceeding one year is a felony.

2. Any misdemeanor the penalty for which does not exceed imprisonment for a period of six months "is a petty offense and does not therefore require a jury trial."

Statutes of the Commonwealth of Pennsylvania

Pa. Stat. Ann. 17, §2042. "The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only."

QUESTIONS PRESENTED

I. Is the defendant entitled to a jury trial when he receives cumulative sentences for contempt of court imposed at the end of the trial and the sentences effectively imprison the defendant for a period in excess of six months?

II. Does the strong possibility of a substantial term of imprisonment require that an accused must be afforded the right to a jury trial in a contempt of court case?

STATEMENT OF THE CASE

The Petitioners, Dominic Codispoti and Herbert Langnes, together with a co-defendant, Richard O. Mayberry, were convicted of criminal contempt in the Court of Oyer and Terminer of Allegheny County, Pennsylvania. The alleged contempt occurred during a six week jury trial on charges of Prison Breach and Holding Hostages in a penal institution. During the course of the trial, Petitioner, Codispoti, accused the judge of trying to protect the prison authorities, railroading the Defendant into life imprisonment, being tyrannical and corrupt. He called the judge "crazy" to believe the co-defendant, Mayberry was sane after a courtroom outburst. He alleged a conspiracy between the judge and the prison authority and in general he was charged with engaging in boisterous and insolent conduct. (App. 33) Petitioner, Langnes, also accused the court of conspiracy, of railroading him, of acting like a convict and he told the court to "go to hell" and offered to shake hands with the judge when they both met in hell. (App. 30)

At the termination of the trial, Judge Albert Fiok summarily sentenced the Defendants from a minimum of one to a maximum of two years consecutive on each of the counts of contempt. Petitioner Codispoti received a total sentence of seven to fourteen years, and Petitioner, Langnes, received a total sentence of six to twelve years. Mr. Mayberry, the co-defendant, received eleven to twenty-two years.

The Defendants all appealed their contempt sentences to the Pennsylvania Supreme Court, which in November, 1968, affirmed their conviction with several dissents based upon the theory of cruel and unusual punishment and the right to a jury trial. (App. 8)

Co-defendant, Mayberry's pro se petition to this Court for a Writ of Certiorari was granted and in January, 1971,

this Court vacated the judgment and remanded the case for further proceedings. (App. 17)

On December 6, 1971, the original state trial court Judge, Albert A. Fiok, issued a contempt citation against the Petitioners and Richard Mayberry, which was to be served on them by registered mail. On December 16, 1971, Petitioner, Langnes, came on for trial and on December 17, 1971, Petitioner, Codispoti came on for trial. Both requested a jury trial and both were denied by the hearing judge, the Honorable Robert Van der Voort.

The trial atmosphere was a somewhat tense one. Mr. Codispoti requested that he be able to have counsel of his own choice to represent him. He stated that on two prior occasions he had written to Judge Fiok requesting an indication of the disposition of the charges, but the judge did not respond to his letter. He had contacted an attorney who had agreed to represent him, but Codispoti only knew one day before the trial that his case was scheduled. The Court then noted that his chosen attorney was not present in the courtroom, and ordered appointed counsel to proceed, even though appointed counsel was unwilling. (App. 43) Petitioner, Codispoti's request for a jury trial was denied as follows:

> The Court: I regard this issue, Mr. Codispoti, as an issue between the Court, not any particular Judge, but between the Court and you, and I think that the record should speak for the Court, and you can speak for yourself, and I'm going to refuse the motion for a jury trial. (App. 45)

A motion was made for production of the defense witnesses. The court again denied the motion in substantially similar language.

> The Court: I am going to refuse your motion to subpoena witnesses for the reasons I have told you. I think this is an issue between the Court and you,

and the record will speak for the Court, and you and counsel can speak for yourself. (App. 47)

The Petitioner Codispoti's frustration at the conduct of contempt proceeding can be sensed by the outburst as follows:

Mr. Codispoti: There is one thing I want to make clear. I came in this courtroom trying to be respectful. Right?

The Court: You have been.

Mr. Codispoti: You know I got ninety years. Right? In fact this is immaterial–

The Court: Excuse me. I do not know that you have ninety years.

Mr. Codispoti: I got fifty years right on that one charge.

The Court: No, I don't. Now that you tell me I know.

Mr. Codispoti: I did not come to this courtroom trying to create a scene or a circus atmosphere. As long as you afford me the right under due process of law I will conduct myself as a gentleman. But if I think you are going to railroad me, mother fucker, you can get that straight jacket again. You understand? Now, you can just run me out of this courtroom, get your blackjack, get your straight jacket, but I don't give a fuck. I am doing ninety years. Now, if you want to make a circus out of this, Chicago Eight, go ahead baby, but if you want to go by the law I will go by law. Make it easy on yourself because I don't give a fuck one way or the other. Now, you do what you want to do. (App. 47)

A similar situation existed with reference to Petitioner Langnes in his trial. (App. 75, 76, 89)

The trial judge found Codispoti guilty as charged and imposed a sentence of three months on one contempt,

six month sentences on five contempts and a year sentence on one contempt. (App. 70) After about a month, the trial judge revised his "rough draft" sentence to six months instead of the year for the last contempt charge. (App. 73) All sentences were made to run consecutive, so that Petitioner, Codispoti has an effective total of three years, two months.

A similar situation existed with Petitioner, Langnes, who was found guilty of all six charges, and sentenced to five terms of six months each and one term of two months so that Langnes has an effective sentence of two years, eight months. (App. 90)

An Appeal was filed in the Pennsylvania Supreme Court and by an Order dated July 2, 1973, the Pennsylvania Supreme Court affirmed the lower court's judgment of sentence. Justice Manderino filed a lone dissenting Opinion on the basis of *United States v. Seale.*

This Court granted Certiorari on December 3, 1973.

ARGUMENT

I.

WHEN PETITIONERS RECEIVE CUMULATIVE SENTENCES FOR CONTEMPT OF COURT IMPOSED AT THE END OF A TRIAL THE TOTAL EFFECTIVE SENTENCE RECEIVED MUST BE USED RATHER THAN THE INDIVIDUAL SENTENCES IN ORDER TO DETERMINE THE SERIOUSNESS OF THE CONTEMPT AND THEREBY DETERMINE WHETHER THE ACCUSED SHOULD BE AFFORDED THE RIGHT TO A JURY TRIAL.

In *Bloom v. Illinois,* 391 U.S. 194, this Court squarely faced the issue whether all criminal contempts could be tried without affording the accused a right to a jury trial ruling that serious contempts required the right to a jury trial. The basis of the decision was two-fold. First, a

criminal contempt is indistinguishable from an ordinary criminal conviction and, therefore, deserves the same jury trial protection. Secondly, and more compellingly, a jury trial provides "protection against the arbitrary exercise of official power", 391 U.S. at 202.

Admittedly, a right to a jury trial exists only in serious offenses, and usually in order to determine the seriousness of the offense, the Court uses as a relevant indication the severity of the penalty authorized for the commission of the crime, *Frank v. United States*, 395 U.S. 147. However, where no statutorily mandated penalty is prescribed, then the Court normally looks to the penalty actually imposed to determine whether the offense is petty or serious. The Federal standard as embodied in *18 U.S.C. 1* states, "any misdemeanor the penalty for which does not exceed imprisonment for a period of six months" is a petty offense and does not therefore require a jury trial." See *Cheff v. Schnackenberg*, 384 U.S. 373, 379.

The lower court in this case held the Petitioners were not entitled to a jury trial because they only looked at the individual sentences, none of which individually exceeded six months and, therefore, concluded that the offenses of contempt were "petty."

It is urged by the Petitioners that where a judge waits until the termination of a trial to sentence a contemnor for several specific contempts, then the aggregate or total effective sentence required the impanelling of a jury for the contemnor.

The basis of the Petitioners' contention rests on several grounds. First, this case does not fit within the traditional reasons for denying a jury trial; second, the potential for judicial abuse alone demands a jury trial and finally, there exists strong policy reasons why there should be a jury trial in this case.

A. The Traditional Policy Reasons for Denying a Jury Trial for "Petty Offenses" Do Not Apply Where There Is a Single Delayed Trial Covering Several Individual Contempts.

Currently, the Supreme Court interprets the Constitution as not requiring a jury trial for defendants charged with "petty" contempts because of several policy reasons, but none of these reasons have any persuasive value in a case such as this.

The first reason advanced is the prophylactic value of immediate punishment as a deterrent against future similar conduct in the same proceeding. Naturally, the Courts have a legitimate interest in protecting protracted judicial proceedings from continuous disruptive behavior and by permitting a trial judge to impose a mild penalty for misbehavior, the Courts will often prevent further occurrences during the same trial. In the instant case, however, where the hearing on the contempts occur after the original trial is completely over, there isn't even a remote possibility of deterence.

The other principal reason for denying a jury trial for petty offenses has been the judgment that the need for judicial economy outweighs the right of a defendant to the protection afforded by a jury.

Counsel for Petitioners does not agree with the previous majority Opinions of this Court that a six months jail sentence is a "petty" imposition upon the individual, but there is practical support since the punishment meted out for most contempts is either a small fine or a very short imprisonment for a few days. Further, fines have often been remitted when judicial tempers have cooled. In this case, however, when the defendants actually face imprisonment for several years for a series of events occurring over several weeks, it is difficult to look at this incident as "petty", thereby outweighing the defendants' rights.

Another aspect of judicial necessity has also been advanced as a reason for denying a jury trial, because, by treating the contempts summarily, they may be immediately handled without delaying or terminating the main judicial proceeding.[1] Again, the problem with this logic applied to the instant case is that since the main proceeding has already been terminated, there can be no possible delay in the main proceedings and the punishment of a sentence following a trial is no less because a jury has been interposed between the judge and the defendant.

B. The Potential for Judicial Abuse Requires the Imposition of a Jury Between the Judge and a Defendant.

The Court has long recognized the necessity of limiting judicial power in contempt cases by interposing procedural safeguards between a human judiciary and a defendant charged with contempt.[2] Generally a judge is looked upon as the impersonal arbiter dispensing justice with no preference or personal interest in the outcome of the case. Exactly the opposite is the situation in a direct criminal contempt case. The judge himself may be either the person villified or, if not the recipient of a personal

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[1] See *In Re Dobbs*, 156 U.S. 565 (1895) at 596. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other Superior courts as essential to the protection of their power and to the maintenance of their publicity . . ."

[2] See *Sacher v. United States*, 343 U.S. 1, at 12 (1925): "That contempt power over counsel, summarily or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which the human flesh is heir."

attack, probably the attack was on a close personal friend and a day-to-day associate and working coleague. Even if these facts are not present, the judge has a vital interest in redressing an affront to the respect of the Court, which by association is also a vicarious affront to the trial judge.

Theoretically, one must recognize the potential for abuse by basing the jury trial requirement upon the punishment attributed to a single offense and concomitantly ignoring the aggregate effect upon the individual. Any judge may ignore the jury trial requirement in a case involving one protracted proceeding by the simple expedient of isolating the events in a continuous course of conduct, thereby individually prosecuting the alleged multiple contempts. Indeed, the judge in a situation involving legitimately isolated contempts may avoid the jury trial requirement on serious offense by distributing the greater punishment for the serious offenses over several petty offenses, thereby keeping each one within the six month proscription.

While the divergence between general legal theory and particular fact has been long recognized in contempt cases of this type, they coincide. In *United States v. Seale*,[3] Judge Hoffman, by isolating occurrences and aggregating the punishment, was able to impose a four year jail sentence for a series of "petty" contempts. Indeed, he accomplished this with not only one defend-

[3] 451 F.2d 345 (7th CCA, 1972).

ant but with several.[4] In this particular case, Judge Robert Van der Voort was able to give the petitioners effective sentences from three years, two months to two years, eight months. (App. 90). In fact, a sentence of one year was given to petitioner (App. 70), Codispoti, and when the effect of the error was realized, the judge reduced the sentence to six months (App. 73).

C. There Are Several Strong Policy Reasons for Affording a Jury Trial in a Case Such as This.

One of the main problems inherent in exercising the contempt power of the Court is the difficulty of the defendant perceiving the Judge as an impartial arbiter. Unlike a normal judicial proceeding, in direct criminal contempt cases, the Judge is the person who initiates the charge, the prosecutor, the trier of fact and, finally, the person who metes out the sentence.

In this particular case, the Judge emphasized on several occasions to the petitioners that this matter was between the petitioners and the Court, and that the record would

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[4] The contempt sentences imposed were:

Defendant	*Charges*	*Sentence*
Dellinger	32 specifications	2 years, 5 months, 16 days
Davis	23 specifications	2 years, 1 month, 14 days
Hayden	11 specifications	1 year, 2 months, 14 days
Hoffman	24 specifications	8 months
Rubin	16 specifications	2 years, 1 month, 23 days
Weiner	7 specifications	2 months, 18 days
Froines	10 specifications	5 months, 15 days
Weinglass (Attorney)	14 specifications	1 year, 8 months, 28 days
Kunstler (Attorney)	24 specifications	4 years, 13 days

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speak for the Court and the petitioners could speak for themselves. (App. 45, 47).

The extreme sense of the petitioner's frustration was apparent in Petitioner Codispoti's outburst when he stated that he tried to act as a gentleman, but that the Court appeared to be so biased and had so prejudged his case that he had no respect for the Court. (App. 47). This allegation is particularly illuminating in light of the contempt citation in which Codispoti was cited for contempt for accusing the trial judge of being in league with prison authorities.

The great benefit that would inure if a jury trial were required in this instance is the appearance of impartiality. As stated by Mr. Justice White in *Baldwin v. New York*:

> "But the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him." 399 U.S. at 72

Secondly, it is unwise for this Court to permit unnecessary extension of the contempt power of a trial judge. An extension is directly contrary to the long held notion that such power should be limited to the "least possible power adequate to the end proposed". *Anderson v. Dunn*, 6 Wheatl 204, 231. Indeed, it would be contrary to the continued policy of this Court over a period of several years to afford defendants charged with contempt the procedural safeguards that are afforded defendants in normal criminal cases.

> Such sweeping statutory authority must necessarily be limited. [T]he grant of summary contempt power . . . is to be grudgingly construed so that the instance where there is no right to a jury trial will be

narrowly restricted to the bedrock cases, when the concession of drastic power to the courts is necessary to enable them to preserve . . . authority . . . order . . . (and) decorum . . . *Farese v. United States*, 209 F.2d 312, 215 (1st Cir. 1954)

The recent decision of *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972), adopted this reasoning in requiring that multiple contempts must be cumulated if the judge waits until the termination of the trial to sentence the contemnors.

"If a judge may wait until the termination of a trial to cite a contemnor with numerous charges of contempt, penalizing each specified instance with a sentence of six months or less and thereby avoid impanelling a jury, the potential for abuse is obvious. Utilizing this procedure any judge could review the record to single out 'discrete' instances of contempt, impose up to six month consecutive sentences for each instance and thereby imprison the contemnor for a theoretically unlimited term. He would in effect, have the power whether the safeguard of a jury trial should be interposed wholly apart from the total punishment he metes out". 461 F.2d at 353.

II.

THE STRONG POSSIBILITY OF A SUBSTANTIAL TERM OF IMPRISONMENT REQUIRE THAT AN ACCUSED MUST BE AFFORDED THE RIGHT TO A JURY TRIAL.

The Pennsylvania Statute (Pa. Stat. Ann. 17 §2042) authorizing imprisonment for contempt of court theoretically subjected the Petitioners to unlimited prison sentences because no limitation upon the length of imprisonment had been statutorily imposed. This case,

therefore is controlled by *Baldwin v. New York*, 399 U.S. 66, wherein the defendant upon conviction was liable to a minimum one year sentence for jostling. This Court held in *Baldwin*, that the defendant must be afforded a jury trial "*on the basis of a possible penalty alone*" exceeding six months. And it is only "[w]here the accused *cannot* possibly, face more than six months imprisonment" that the need for a jury trial is outweighed by other considerations. (Emphasis added).

Moreover the Petitioners were not only faced with the theoretical legal possibility of a substantial sentence, they had indeed earlier received sentences in excess of twenty years for their acts from the Judge who had first sentenced them. There were absolutely no indication what sentence they would receive from the new trial Judge if they were found guilty. However as an indication of how the courts viewed their acts, Mr. Justice Douglas charterized their actions as a shock to those raised in the Western tradition.[5] The Chief Justice of Pennsylvania Supreme Court termed their conduct "outrageous"[6] and the trial court called their actions "dispicable, insolent and shocking".

In this case the Petitioners faced a judge presumably unfamiliar with their case and therefore incapable of assessing a penalty before the trial began. Nonetheless, the real possibility existed that a sentence of more than six months would result, thereby fulfilling the requirement of *Baldwin.*

By refusing to initially grant a jury trial the lower court judge arbitrarily prejudged the case and decided

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[5] App. 17.

[6] App. 20.

that the offense was petty and more importantly deprived the Petitioners of a right to interpose a jury of fact-finders between themselves and the judge. The Judge sentenced Petitioner, Codispoti, to one year evidencing that the contempt was indeed serious. The subsequent reduction of the sentence to six months was a fruitless gesture.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the relief requested be granted.

Respectfully submitted,

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